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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 03 2009

SRC 07 800 25736

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research associate at the University of North Texas (UNT). The petitioner subsequently relocated to Pullman, Washington.[1] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of materials already in the record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

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[1] According to USCIS records, Washington State University College of Veterinary Medicine, Department of Veterinary and Comparative Anatomy, Pharmacology and Physiology filed Form I-129 to obtain an H-1B nonimmigrant visa on the petitioner's behalf on March 28, 2008. The Form I-129, receipt number WAC 08 125 50801, was approved on April 3, 2008, but the approval was revoked on January 9, 2009.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Five letters accompanied the petitioner's initial submission. All of these letters emphasize one article that the petitioner published in *Archives of Biochemistry and Biophysics*. UNT Associate Professor [redacted], who supervised the petitioner's doctoral studies, focused on the petitioner's "great

expertise" in various laboratory techniques such as liquid chromatography and molecular genetics. He stated:

> [The petitioner] quickly learned to implement cutting edge techniques that combine chemical modifications, computational modeling, and unique fluorescence labeling to clarify some of the mechanisms involved in the most widespread forms of heart disease that affect young adults.
>
> [The petitioner's] recent research has led to a cover photo and full-length publication in a leading journal, Archives of Biochemistry and Biophysics 456, 102-111, (2006). In this work he demonstrated a novel method for site-specific fluorescent labeling of proteins as illustrated in the protein myosin. He characterized a key structure for myosin's function in muscle contraction in a region that is sometimes modified by mutations that cause heart disease. He has also creatively developed further results that provide insight into the complex internal interactions of the myosin protein that enable it to produce force in muscle.

[redacted] who served on the petitioner's doctoral advisory committee, praised the petitioner's "great breadth of technical knowledge" but did not discuss the petitioner's work in much detail. [redacted] stated that the petitioner's "research is also novel enough to have been published in *Archives of Biochemistry and Biophysics*."

[redacted] of the University of California, Berkeley, indicated that he first met the petitioner at a professional gathering in 2007. stated:

> [The petitioner] is a very accomplished young biophysicist who has published an important contribution in a fundamental area. He published this work in the *Archives of Biochemistry and Biophysics* in 2006. This research involved the important molecule, myosin. Myosin is the molecule in muscle that does mechanical work. . . . To do work, myosin must convert chemical energy into mechanical work. Just how it does that is unknown, and is the fundamental question that [the petitioner's] method addresses. By combining a novel experimental technique with computer simulation based on structure of myosin S1, his research led to a striking conclusion: large movements of a part of myosin that might be the bridge between the release of free energy and the performance of work do not take place. This finding eliminates one of the strong contenders for how myosin converts energy.

Research Associate Professor at Eötvös University, Budapest, Hungary, stated:

> [The petitioner] has markedly advanced scientific understanding relating to myosin, a highly important motor protein driving a wide range of both autonomous and voluntary muscular actions. Among his contributions related to this topic, [the petitioner] created an innovative and generally applicable fluorescent labeling procedure specific for the so-

> called strut sequence of subfragment-1 (the catalytically active part) of myosin. His development of a protocol to label and isolate a skeletal muscle myosin subfragment-1 with a single fluorescent probe at the strut sequence opens the door for spectroscopic studies of this key structure. . . .
>
> These findings by [the petitioner] provide remarkable insights for our knowledge of how small modifications to the contractile proteins impact their normal functions and activity and cause diseases. The interaction of myosin with actin filaments is a central element in the motile actin of the myosin motor, which is also investigated by my laboratory using different approaches. Therefore [the petitioner's] research findings have very important implications affecting my own research.

[redacted] of Marquette University, Milwaukee, Wisconsin, stated:

> For this letter, I will focus on [the petitioner's] breakthrough documented in *Archives of Biochemistry and Biophysics*. Through his paper in this journal, [the petitioner] . . . has convincingly ruled out the strut of S1 for being the cause of [conversion of chemical energy into mechanical energy]. . . . We now know that we should divert our attention to other critical sites in S1 other than the strut as a result of [the petitioner's] major finding.

Counsel stated that the petitioner's "work has been highlighted in Biotech Business Week, thus further establishing the significant attention his work has garnered." The petitioner submitted a one-page printout from *Biotech Business Week*, dated April 2, 2007. The article reported that the petitioner and others had published a study on "[a] new fluorescent labeling procedure" in *Archives of Biochemistry and Biophysics*. The *Biotech Business Week* story consists almost entirely of quotations from that article, with no further comment on the significance or importance of the petitioner's article. The story appears to be, essentially, a press release announcing the publication of the *Archives of Biochemistry and Biophysics* article. The petitioner, at the time, provided no evidence to show how common or how rare it is for *Biotech Business Week*, an online publication of NewsRx, to publicize newly-published articles in this way, or the criteria by which that publication selects which articles to mention. Therefore, the petitioner did not establish how this story is evidence of "significant attention."

The petitioner submitted copies of two articles he had co-authored. In addition to the *Archives of Biochemistry and Biophysics* article discussed above, the petitioner's work appeared in *Biochemistry* in 2004. To establish the impact of these articles, the petitioner also submitted a printout from *SciFinder Scholar*, listing six articles by other researchers. The list itself offered no clue as to what these articles have in common – the printout does not even show the petitioner's name – but a later submission indicates that the list identifies articles that contain citations to the petitioner's work.

As shown above, the initial submission focused very heavily on the publication of one of the petitioner's articles in *Archives of Biochemistry and Biophysics*. The petitioner's initial submission did not contain persuasive objective evidence to establish the impact of that article. For example, the initial

submission included no documentation to show how frequently (if at all) other researchers had cited the petitioner's article.

On March 21, 2008, the director issued a request for evidence. The director acknowledged that the petitioner had produced published work, but found that the petitioner had not yet established the impact of his published articles. The director therefore instructed the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing [the petitioner's] research and/or contributions," or printouts from a citation database establishing that such citations exist.

In response, counsel asserted that the petitioner's "paper in *Archives of Biochemistry and Biophysics* was featured as a cover photo article. (Exhibit 16)." Exhibit 16 is a copy of the article itself, with no evidence that it was the "cover photo article" for that issue of the journal. Even if it was the "cover photo article," the record contains nothing to establish the special significance of its appearance on the cover. The most one could infer without such evidence is that the article was among the most significant to appear in that one issue of the journal.

The petitioner submitted copies of four articles containing independent citations to his work. (The other two articles identified in the previously submitted list were written by the petitioner's collaborator [redacted]) All of the citations refer to the petitioner's 2004 *Biochemistry* paper; there is no evidence that any researcher had cited his 2006 article in *Archives of Biochemistry and Biophysics*, despite the assertions as to the seminal nature of that paper. At least two of the four submitted articles are review articles, which summarize the existing literature rather than report new scientific findings. One review article, from *Chemical Reviews*, contained citations to 661 articles.

Regarding the aforementioned story in *Biotech Business Week*, the petitioner submitted a letter from [redacted], Coordinator of Science and Technology Reference at UNT Libraries. Ms. [redacted] repeatedly referred to the story as "a news release." The evidence indicates that the *Biotech Business Week* story appeared not because the petitioner's 2006 article attracted "attention," but rather because UNT arranged for *Biotech Business Week*, and several other online publications under the NewsRx umbrella, to issue a "news release" about the article in April 2007, some eight months after the article first became available in August 2006.

The petitioner submitted four more witness letters in response to the request for evidence. Purdue University Assistant [redacted] stated: "we are now investigating the mechanism behind [the petitioner's] major discovery about the strut of myosin. . . . His work and protocols helped in laying the foundation for our research."

[redacted] of the University of California, San Francisco credited the petitioner with "the first time any researcher had succeeded in labeling the myosin strut using a fluorescent label which is a new advancement in biophysics."

[redacted] of the Mayo Clinic, Rochester, Minnesota, stated that the petitioner's "findings about the function of the strut has shown the way for our field in exploring this structure to understand the mechanism leading to cardiac diseases."

University of Minnesota [redacted] stated that he and his collaborators "have found [the petitioner's] breakthroughs to be very beneficial for our own research. . . . Our recent papers and grant proposals have benefited considerably from his example."

The director denied the petition on May 6, 2008, noting that the petitioner had published only two articles, one of which had no documented citation history. The director found that the available evidence "fails to establish that the petitioner has exhibited a significant degree of influence on his field of endeavor."

On appeal, counsel argues that the director failed to give due consideration to independent witness letters and other evidence of the petitioner's wider influence on his field. While independent witness letters can provide strong support for a national interest waiver petition, it does not follow that the submission of such letters must result in approval of the petition. We must take all factors of a given proceeding into account. The letters in question are often general in nature, and unsupported by documentary evidence. For instance, Prof. Thomas asserted that his "recent papers . . . have benefited considerably from" the petitioner's work, but there is no evidence that Prof. Thomas had cited the petitioner's work in any published article.

Counsel argues that *Matter of New York State Dept. of Transportation* requires only "'some degree of influence,' not a 'large degree of influence'" (counsel's emphasis). The AAO rejects the implied argument that the job offer requirement is restricted only to those researchers who have had no influence whatsoever on their respective fields. The cited decision requires "a past history of demonstrable achievement with some degree of influence on the field as a whole. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest." *Id.* at 219, n.6. When we consider, also, that a basic purpose of academic scientific research is to disseminate novel findings to others in the field, it is apparent that rarely is a given's scientist's work entirely devoid of influence or benefit to others. The reference to "some influence" should not be interpreted to mean "any degree of influence above none at all," and removing that phrase from its original context does not compel such an interpretation.

Counsel condemns the director's "very simplistic counting of how many times Petitioner/Appellant's work has been cited." Considering the heavy emphasis that the petitioner has placed on his 2006 article in *Archives of Biochemistry and Biophysics*, to the point where many witnesses discuss little else, it is neither simplistic nor irrelevant to observe the total lack of evidence that any researcher has ever cited that article (UNT's own promotional press release is not a scholarly citation).

The record clearly indicates that the petitioner filed the present petition at the very beginning of his professional career, having completed his doctorate only a few months earlier. His work may well prove to be influential and especially important with in his field, but the record as a whole does not

indicate that the petitioner had reached such a level as of August 2007 when he filed the petition. At best, the petition appears to have been filed prematurely.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.